IN THE

Supreme Court of the United States

OCT 31 1974

GEORGE F. GODAK, JR., CLERK

OCTOBER TERM, 1974

No. 74-510

RICHARD THORNE, a/k/a OM,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

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OCTOBER, 1974 TERM

No. Misc.

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RICHARD THORNE, a/k/a "QM",

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

Petitioner, RICHARD THORNE, a/k/a "QM", respectfully prays that this Court issue a writ of certiorari to review the Judgment and Order of the United States Court of Appeals for the Second Circuit, which affirmed petitioner's conviction for Possession of Counterfeit Currency in Violation of 18 U.S.C. 472, Possession of Plates and Negatives used to print that currency in violation of 18 U.S.C. 474 and Con-

spiracy in violation of 18 U.S.C. 2.

Petitioner was convicted after a jury trial in which he represented himself, in the United States District Court for the Southern District of New York, United States District Judge Canella, presiding.

He was sentenced on May 15, 1974 to a maximum term of three years in prison. The Court of Appeals affirmed on September 30, 1974.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1251. No opinion was written by the Court of Appeals.

QUESTIONS PRESENTED

1. Whether, after an extensive search, pursuant to a warrant, the government agents who returned to the premises seven days later, to ostensibly transport a printing press, could seize new materials in alleged open view, on the theory that the search was still ongoing.

2. Whether, considering the government's use of a federal waiver of counsel form, the failure to obtain Petitioner's signature on said form and the failure to record the advisement of Petitioner's rights during a

tape recorded interview, deprived Petitioner of due process.

3. Whether the evidence adduced, considering the injection by the prosecutor into the trial of Petitioner's religious belief was so lacking in probative value so as to deprive Petitioner of a fair trial.

STATUTES

Sec. 472 Uttering counterfeit obligations or securities

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both. June 25, 1948, c. 645 62 Stat. 705

Sec. 474 Plates or stones for counterfeiting obligations or securities

Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, uses such plate, stone, or other thing, or any part thereof, or knowingly suffers the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or

Whoever makes or executes any plate, stone, or

other thing in the likeness of any plate designated for the printing of such obligation or other security; or

Whoever sells any such plate, stone, or other thing, or brings into the United States any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; or

Whoever has in his control, custody or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; or

Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or

Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; or

Whoever has or retains in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security,

except under the authority of the Secretary of the Treasury or some other proper officer of the United States --

Shall be fined not more than $5,000. or imprisoned not more than fifteen years, or both. June 25, 1948, c. 645 Stat. 706.

FACTS

Federal agents searched a loft at 146 West 25th Street, New York City, on July 26, 1973 pursuant to a search warrant. That loft was allegedly occupied by the Petitioner, known as "OM", who was the leader of a religious group of "OM LOVERS". There was absolutely no proof that OM lived or slept at the loft, but the basic theory of the government in the case was that since the OM LOVERS were people who followed his wishes and were under his direction and control, the presence of the counterfeit plates and materials on the premises could be attributed to him.

A religious aspect was injected into the proceedings by the government, when the prosecutor, in his opening statement, told the jury that the government would prove the existence of the group, composed of a number of women with assumed names, such as LADY LOVELIGHT, LADY INSPIRATION, LADY VIRTUE and LADY CHARITY, and that OM was the leader of that group, under whose direction they

acted (4-6)*. The prosecutor also told the jury that the group believed that many institutions in our society, such as the American monetary system, were obsolete, and that they should be dispensed with, apparently a moral justification for the production of counterfeit money.

At any rate, the testimony, both at the suppresion hearing and at the trial, essentially was that an extensive search, lasting for approximately three hours was conducted at the premises by many agents working in conjunction with city police (49-51).

Nothing of great substance was first discovered except that there were printing presses on the premises, which were eventually dismantled and removed by the government. The officers secured the premises and gave a key to the landlord when they left. They returned on August 1, 1973, seven days after the search, for the purpose of considering the feasibility of moving the two large presses, even though they had already retained a moving company for that purpose. (Memorandum and Order on Suppression Motion, Briant, J. March 21, 1974, 6-7, 52-53, 4-5)

*Numerical references are to pages of the original record.

While the officers looked at a plasterboard partition located in the loft to determine whether it would have to be removed to take the presses out, one of the officers testified that he noticed a green roll of paper, allegedly in plain view, sticking out from one of the partitions. He discovered this as he looked down into a hole in the partition (Hearing, p. 20). The officer also said that the roll of paper was protruding from cement that had not hardened, although it was obvious that no one was on the premises for seven days. The observation led him to tear down the entire partition and a vast amount of counterfeit money, plates and other materials were found concealed in the wall (H21, 241-251).

The Trial Court upheld the search because the material was in plain view, taking the view that what was really involved was a seizure rather than a search (261-262). The Court of Appeals, in affirming, read into the record its opinion that the search should be viewed as continuing, so that when the agents saw the evidence they had cause to tear down the wall and recover the rest of the material.

There was also an admission issue in this case. The Petitioner was arrested on October 6, 1973, and one officer testified that while he was transporting Petitioner to headquarters, he told Petitioner not to say anything. Another agent processed him, but the Petitioner could not wait to start making incriminating statements, he was so desirous of confessing. Officer OTT testified that he also advised the Petitioner about his rights of self incrimination. Thereafter, OTT brought the Petitioner into the interview room and had Form 1737 with him, which was an adivsement to the Petitioner of his rights and had a place on it for a signature by the Petitioner. Petitioner, OM, allegedly acknowledged that he knew his rights and because he was so anxious to talk he did not bother to sign the form, although he apparently wrote on it at the top (10-11). The truth probably was that when OM saw what the form really was, he refused to sign it because he never intended to waive his rights in the first place. The officer also asked the Petitioner if he had any objection to being interviewed on tape and when Petitioner supposedly agreed, a tape interview

lasting more than one hour occurred. Lo and behold, the officer thought the tape recorder was going, but apparently the first thirty minutes of the interview was not recorded, at the very place where Petitioner was advised of his rights. The interview continued for an hour and fifteen minutes, but the agents never again advised him of his rights, so that nowhere in the record does it show that the Petitioner knew that what he said could be used against him (12-13). However, the agents testified that they had given the Petitioner his rights, and that he was so anxious to talk that he did not consider it important (40-44). Obviously, if this was true, he would have signed the card, and certainly somewhere during or after the taped interview, the agents could have read Petitioner his rights. The truth of Petitioner's claim is thus made plausible, that what he really was told was that his statements would not be used against him.

The only other evidence in the case was that the fingerprints of the Petitioner appeared on two plates or pieces of paper, although there was nothing to indicate when they had been placed there, and some hand-

writing of Petittioner was found on a currency-size piece of paper, although the nature of the statement has no relationship to the trial. The government also introduced a picture of OM, standing naked next to a printing press (T278).

No one could testify that Petitioner slept on the premises, and in fact he hardly ever visited there.

POINT I

THE SEARCH OR SEIZURE CONDUCTED IN THIS CASE WAS CLEARLY VIOLATIVE OF PETITIONER'S RIGHTS.

The facts of this case regarding the seizure by federal officers of a large amount of counterfeit currency, plates and other materials, are not complicated. As has been pointed out, the Trial Court justified the search on the basis of its conclusion that the officers observed materials in plain view, and the Court of Appeals held that the search was merely a continuation of one embarked upon seven days earlier.

The officers in this case had a search warrant for the loft premises in question and swarmed upon the premises in many numbers searching for about three

hours for evidence incounterfeiting. They found nothing of value, but when they returned seven days later, on August 1, 1973, in order to determine how to move two large printing presses, they supposedly then saw contraband in plain view which led to the seizure. The substance of the testimony was that a partition existed in the loft, but that on one side of the partition the wood portion of the wall did not go all the way up to the ceiling On this second occasion a police officer looked down into the partition and observed a roll of green paper sticking out of some wet cement. This preposterous testimony was apparently believed by the Courts below, even though it is almost incredible that the officers did not discover this evidence during the three hour search they conducted the first time, and we suggest it is practically common knowledge that cement in such an area could not possibly still be wet seven days after the first search.

At any rate, discovery of the roll of green paper led to the dismantling of the entire wall and the evidence sought to be suppressed was contained therein.

It is submitted that a novel question is presented

in this case regarding whether you can continue a search where such a long time gap occurs between the initial search and eventual seizure, especially in view of the fact that the officers had ample time to make a thorough search on the first occasion. This is not like the automobile situation which occurs generally where police make a search at the precinct rather than out in the street. In that situation, there are good security reasons why a search should be made at the precinct, and the theory has been that a search could have been made in the street, but merely postponing it does not work any great deprivation of rights. Also in that situation, there has been no opportunity to make a thorough search when the car is first encountered. In the case at bar, a similar justification cannot be relied upon, because a thorough search occurred the first time and the premises were secured and constantly in control of the police since the search. There seems to be no logical reason why the necessity of obtaining a second search warrant should be dispensed with or why this should be viewed as a continuing search. It is also a logical con-

clusion that based upon the facts of this case, the intent of the officers on the second occasion was to search and not to prepare for removal of the printing presses, since a moving company had already been engaged , and it is hard to believe what expertise the officers themselves could have had so that they would not have left the entire matter to the movers. In addition, the Trial Courts reliance on United States v. Green, 474 F.2d 1385 (5th Cir. 1973) seems to have been misplaced. Unlike that case, the removal of the roll of paper in the case at bar revealed nothing of importance and nothing further came into "plain view". If the agents felt that that roll of paper, in and of itself, constituted probable cause to justify tearing down the wall, they could have submitted the matter to the Federal Court for a decision.Nothing at all was revealed after the roll of paper was taken, so that the "plain view" doctrine would seem to be inapplicable. Indeed, the wall had to be torn down to find the evidence which was claimed to have been in plain view. The truth of the matter is probably that the roll of paper was never found inthe cement, or

even if it was, the agents merely tore down the wall based upon speculation which turned out to bear fruit. The cases of Terry v. Ohio, 392, U.S. 1 (1968) and Harris v. United States, 390 U.S. 234 (1968), relied upon below, do not seem to support the government's position.

The search warrant that justified the search of July 26, 1973 had become thoroughly satisfied because of the lengthy and extensive search made by the agents and there seems to be no doctrine to support the facts of the contention that a further search on August 1, 1973 could take for its justification the very same search warrant. Cady v. Dombrowski, 413 U.S. 433 (1973) and Coolidge v. New Hampshire, 403, U.S. 443 (1971).

POINT II

THE ADMISSIONS USED AGAINST THE PETITIONER WERE OBTAINED IN BLATANT DISREGARD OF HIS CONSTITUTIONAL RIGHTS.

The testimony regarding the obtaining of admissions from the Petitioner herein represents the most unusual series of fortuitous mishaps, or must be the product of deliberate lies on the part of the

the government agents. The government witnesses testified that Petitioner was advised of his rights in the car taking him to be processed after his arrest. In fact, the agent testified that he even told Petitioner not to answer questions, although Petitioner was apparently eager to reveal his entire role in the counterfeiting scheme. Again, while Petitioner was being processed at the precinct, he wanted to confess his sins, but was again advised of his rights. Finally, Petitioner was brought to the interview room and a waiver of rights form was presented to him by the government. The testimony was that although he seemed to sign a portion of it at the top, he was so eager to confess that he neglected, or had no time, to sign the bottom, which would have indicated his consent to waive his constitutional rights. It stretches reason to incredible length when one is asked to believe that a person who is willing to make a confession would not have signed the form that would have ended any controversy regarding the legality of obtaining that confession from him. No agent worth his salt would have omitted

obtaining the necessary signature if, indeed, the Petitioner really wanted to make the admissions he is said to have made. It is more likely that Petitioner may have intended to make these admissions and was probably told they could not be used against him. It was only when he realized what the true nature of the situation was that he decided not to incriminate himself so manifestly, and he refused to sign the card.

That view is made even stronger by the officer's testimony regarding the interview itself. We are asked to believe that the Petitioner consented to having his interview taped, and that he actually answered questions during a taped session for about one hour and fifteen minutes. We are also asked to believe the agent's testimony that Petitioner was advised of his rights at the beginning of the session, but lo and behlcld, something was wrong with the tape machine and it never recorded that portion of the interview. The agents then continued to tape the interview and relied upon their own testimony that they gave the Petitioner his waivers. How can we be expected to believe that in such a situation with such a willing confessor, the agents would

obtaining the necessary signature if, indeed, the Petitioner really wanted to make the admissions he is said to have made. It is more likely that Petitioner may have intended to make these admissions and was probably told they could not be used against him. It was only when he realized what the true nature of the situation was that he decided not to incriminate himself so manifestly, and he refused to sign the card.

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not have gotten another tape and had the Petitioner waive his rights on it, even if it came after the main interview? It is too great a coincidence to believe that the tape recorder did not work only during that portion when the Petitioner was advised of his rights, and also that the Petitioner's signature was absent from the waiver card only because he was so anxious to confess. If that were true, he most certainly would have agreed to retape the interview and would have agreed to be given his advisements and waive that matter on the recording.

POINT III

THE PETITIONER DID NOT RECEIVE A TRIAL WHICH CAME WITHIN THE CONCEPT OF DUE PROCESS BECAUSE OF THE INJECTION OF HIS BELIEFS INTO THE TRIAL BY THE PROSECUTOR.

As we have discussed in Points I and II, the basic evidence against the Petitioner arose from situations involving serious questions of the invasion of his constitutional rights. In addition, the only substantial evidence that existed against the Petitioner were fingerprints found on a piece of paper on which currency was printed and a writing of the Petitioner

on another piece of paper which was the same size as currency. It could not be established at the trial when the Petitioner's fingerprints appeared on the document or under what circumstances. The only other evidence which the prosecution used to establish control was the testimony by the superintendent that on a few occasions when matters of arrears of rent were discussed, the superintendent discussed those matters with the Petitioner. There was absolutely no direct evidence that Petitioner had any control of the premises or directed the transactions in counterfeiting. The government relied exclusively on the theory that QM was the leader of this movement and his disciples were people who were sworn to obey his commands and directives.

This issue was first inserted into this case by the prosecutor when in his opening to the jury he argued that the group was subject to the Petitioner's commands (2-5). It is submitted that this brought a religious aspect to this case, and that the effect, when one looks at the record, was to place the Petitioner on trial for his unorthodox and possibly repugnant

religious beliefs, rather than for the crime as charged. We believe that the government should have been put to prove the charges against OM through direct evidence and evidence relating solely to OM's presence on the premises, rather than a strange theory which contained the danger of putting these irrelevant and inflammatory issues before the jury.

When all of these factors are considered together, we believe that the Petitioner did not have a fair trial, and that the issues arising out of the proceeding were serious and worthy of consideration by this Court.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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PREMINGER, MEYER & LIGHT
OF COUNSEL

ORDER OF AFFIRMANCE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

For The

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of September one thousand nine hundred and seventy-four.

Present: HON. PAUL R. HAYS

HON. ROBERT P. ANDERSON

HON. WALTER R. MANSFIELD

Circuit Judges

- X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

74-1663

v.

RICHARD THORNE, a/k/a/ OM,

Defendant-Appellant.

- X

Appeal from the United States District Court for the Southern District of New York.

[illegible] based on the trans-

ORDER OF AFFIRMANCE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

cript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

By: VINCENT A. CARLIN
Chief Deputy Clerk